FMLA
FREQUENTLY ASKED QUESTIONS
Part III

INTERMITTENT LEAVE

1. Can the employer require an employee who is using intermittent FMLA leave to have their appointments during non-work hours unless the employee can demonstrate that the treatment and appointments cannot occur during non-work hours?

There is an obligation by the employee to consult with the employer prior to making appointments to develop a schedule of treatments that meets the needs of both parties. The employer may request that the employee change a treatment date or schedule a treatment outside of work hours, if scheduling the appointment during work is unduly disruptive; however, it has to be more than an ordinary inconvenience to the employer. The employee is not entitled to an entire day off if their appointment is at 10:00a.m. and they could be back at work by 1:00p.m. The employer cannot force the employee to take the whole shift off if they need to only be absent for a few hours.

See 29CFR825.302:

(e) When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable attempt to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider.

See 29CFR825.203:

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness. An employee may

not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave.

2. **Is the employer obligated to approve work schedule adjustments under FMLA? For example: an employee provides medical certification from their doctor to work 9:00 a.m. – 5:30 p.m. daily, instead of 8:00 a.m. – 4:30 p.m.?**
This question also falls under "undue disruption". FMLA excuses an eligible employee's **absence** from work if the absence is FMLA qualifying. So, if the medical certification states the employee has a serious health condition that makes them unable to perform one or more essential functions of their job, and the person would be **working less than an a full shift**, then the employer would need to consider the request under FMLA. Remember the employer may transfer the employee to another position that better accommodates their FMLA intermittent or reduced schedule leave.

An adjusted work schedule may fall under an ADA Reasonable Accommodation as well. If the employee is requesting a change in start and stop times for their "normal shift", but they are capable of working a full shift, then the request should be reviewed in light of an ADA Reasonable Accommodation to see if the employee meets the definition as outlined in the CS Regulation 1.04. If so, the employee should submit a request through that process.

See 29CFR825.204:

(a) If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, including during a period of recovery from a serious health condition, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. See Sec. 825.601 for special rules applicable to instructional employees of schools.

(b) Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

RETURN TO WORK STATEMENT

3. If the employee has already returned to work after using 5 days of sick leave and within 2 business days after their return they are given the FMLA paperwork – can the employer at that point require a return to work statement?

If the employer has a uniform policy, or there is an applicable collective bargaining agreement provision, that requires a return-to-work statement after using a specified number of days of sick leave, the employer may require one. Without such a uniform policy or collective bargaining agreement provision, it would be too late to require a return-to-work statement once the employee has returned to work.

See 29CFR825.310:

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may

not delay the employee's return to work while contact with the health care provider is being made.

RIGHT TO RETURN

4. The employer has an employee who is in a "Limited Term Appointment" and would like to expire the employee's appointment for budgetary reasons. The employee is currently out on FMLA leave. Does the FMLA prevent the employer from expiring the appointment while the employee is out? The employer will not be filling this vacancy.

The FMLA does not prevent the employer from expiring an employee's position while on FMLA leave if the position would otherwise end. Although expiration of a limited term appointment for budgetary reasons is **not** a layoff, the example in (a)(1) below is instructive because the employer may have a continuing obligation to the employee under a collective bargaining agreement or Civil Service Rules and Regulations, if the employee had achieved status in an indefinite appointment prior to accepting the limited term appointment.

See 29CFR825.216:

(a) An employer has no greater right to reinstatement or to other benefits and conditions of employment that if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example;

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

FMLA TO COVER FOR TIME AND ATTENDANCE ISSUES

5. An employee under corrective action for time and attendance is absent two (2) days then provides the employer with a medical statement and requests FMLA for those two (2) days. Does the employer have to allow the absence under the FMLA?

The employer **might** be required to allow the absence under the FMLA if the employee is eligible for FMLA leave and provides a completed Medical Certification of a Health Care Provider form, CS-1790, documenting that, due to a serious health condition, the employee was unable to perform one or more of the

essential functions of their position during their absence. Things to consider in this situation would be; does the absence involve inpatient care, a chronic illness, or was the absence due to pregnancy or for prenatal care.

Under 29CFR825.114, "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or

- a period of incapacity requiring absence of more than **three (3) calendar days** from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or

- any period of incapacity due to pregnancy, or for prenatal care; or

- any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or

- a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or,

- any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

6. An employee under corrective action for time and attendance is absent three (3) days, then requests FMLA coverage for the absence. Does the employer have to approve the request? And, can the absence be subject to corrective action for time and attendance?

An employee has two (2) business days after they return to work to designate their time as FMLA. The employee would still need to provide a completed Medical Certification form, CS-1790, which supports their need for FMLA, and be eligible for FMLA. If the employee is eligible and they provide the Medical Certification form to support the need for FMLA leave, the employee is entitled to FMLA leave and the absence cannot be subject to corrective action for time and attendance.

See 29CFR825.208:

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within

two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

7. **If the employee has insufficient sick leave credits to cover their absence, or is absent three (3) consecutive days or more, the employer currently requires employees to provide medical documentation that is signed by an M.D., D.O., Dentist or Chiropractor. The employer does not accept physician's assistants or nurse practitioners in these circumstances. Can the employer continue these standards if the time is <u>not</u> qualified under FMLA?**
Yes, as long as the absence is not covered by FMLA, and the employer has an established policy that is uniformly administered, the employer can continue to require medical documentation signed by specified health care providers.

<u>RECERTIFICATION</u>

8. **If an employee suffers from a permanent/long-term condition such as migraine headaches and has been given approval by the employer for intermittent leave usages, when may recertification be required?**
If the Medical Certification, CS-1790, certifies a need for intermittent leave and indicates a minimum period of time, such as one week or one year, an employer may not request recertification in less than the period specified, **<u>unless</u>** an extension of the leave is requested or circumstances described by the previous certification have changed or the employer receives information that casts doubt on the reason for the employee's absence. As noted below, recertification cannot

be requested more often than every 30-days and only in connection with an absence; however, if the medical certification is for a period of time less than 30 days, and the employee requests an extension of FMLA leave, the employer may require recertification.

See 29CFR825.308 (emphasis added):

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in Sec. 825.114(a)(2)(ii), (iii) or (iv)), an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, **unless**:

(1) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or

(2) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(b) (1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed **unless** one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employer may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) **unless** one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employer may request recertification at any reasonable interval, but not more often than every 30 days, **unless**:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or

(3) The employer receives information that casts doubt upon the continuing validity of the certification.

(d) The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

9. An employee states they are going on a medical leave and they do not mention FMLA. The employer informs them that they will need a medical statement with prognosis, diagnosis and expected return to work date. When the employer receives the information a letter is sent to the employee stating that all time off will count towards their FMLA entitlement. Should the employer tell the employee (since it is in the employee's best interest) that they should request a FMLA leave? Is a medical leave now just assumed to be a FMLA leave?

In order for FMLA to apply, the employee does not have to state that the requested medical leave is for a FMLA qualifying reason. If the employer has reason to believe the absence may be FMLA qualifying and the employee is eligible for FMLA leave, the employer should give the employee the FMLA paper work when they request a medical leave and they should provisionally designate such leave until there is a determination whether the circumstances fall under those for an approve FMLA leave. The employer should expect that all medical leave requests have the potential to fall under the FMLA and exercise the employer's right to charge the employee's absence against the FMLA leave entitlement whenever appropriate.

In the above scenario the employer should not first inform the employee they must submit a medical statement with a prognosis and diagnosis before determining whether the time off may qualify for FMLA leave. The FMLA does not require the employee to provide a prognosis or diagnosis, and under the FMLA the employer may only ask for the information on the Medical Certification form, CS-1790. The employer should handle all medical leave requests as if they qualify for FMLA leave until it is determined they do not qualify. Then the employer should provide the employee with a Medical Certification form, CS-1790, and the completed Employer Response form, CS-1789, with the provisional approval box marked.

See 29CFR825.208 (emphasis added):

(2) As noted in Sec. 825.302(c), an employee giving notice of the need for unpaid FMLA leave **does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave.** An employee requesting or notifying the employer of an intent to use accrued paid leave, even if

for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave--consistent with the employer's established policy or practice--and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

Also see 29CFR825.306.

10. One of our occupational health providers is refusing to complete FMLA forms for an employee stating that it is "worker's comp" therefore FMLA does not apply.

Many physicians do not know or understand that the FMLA gives employers the right to run workers' compensation and FMLA concurrently when the injury is one that meets the criteria for a serious health condition. If the occupational health provider refuses to complete the FMLA forms the employer must make their determination based on the medical information provided by the workers' compensation claim. The employer is also obligated to provide the employee with notice of the designation as FMLA.

See 29CFR825.207 (emphasis added):

(2) The Act provides that a serious health condition may result from injury to the employee "on or off'' the job. **If the employer designates the leave as FMLA leave in accordance with Sec. 825.208, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition.**

As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a “light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a “light duty job". As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. See also Secs. 825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and 825.702(d) (1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

11. Is it possible for a pregnant employee to take the full 12 weeks of FMLA leave off and then have a 6-month reduced work schedule after the 12 weeks?

Pregnancy is considered a serious health condition under the FMLA. To the extent an employee who is eligible for FMLA leave is unable to perform one or more of the essential functions of their job due to their pregnancy prior to the birth of the child, their FMLA counter will start and the time used will go against their 12-week FMLA entitlement. After the baby is born, any remainder of the employee’s 12-weeks of FMLA will then run until the employee is medically certified able to return to work, which is typically 6 weeks for a normal delivery and 8 weeks for a C-section. The employee can use either sick leave or annual leave to remain in pay status during the FMLA leave. If the employee is planning to go on Long Term Disability (LTD) for this period, the LTD plan requires exhaustion of accrued sick leave or a 14-day waiting period, whichever is longer, before LTD benefits begin.

Once the employee is medically certified able to return to work, they may request to take any remaining FMLA leave on a reduced schedule as family care leave. Under the FMLA family care leave provision, the employer need not approve the request for a reduced schedule for the birth of a child. Once the FMLA family care leave taken on a reduced schedule is exhausted, the employee may be eligible for up to 6 months of unpaid parental leave under their collective bargaining agreement or the Civil Service Rules and Regulations.

If the employee does not request a reduced schedule for family care leave and chooses to go on an unpaid parental leave instead, any FMLA family care leave the employee has remaining from their FMLA leave entitlement would run concurrently with the unpaid parental leave. (Unpaid parental leave may not be taken on a reduced schedule, nor can paid leave be substituted, and the leave must be concluded within 12 months of the birth of the child.)

Reduced schedule or intermittent leave due to the birth of a child is at the discretion of the employee's department and the department has the right to place the employee in a different position or change their days off based on operational need. The employee may want to discuss their options with their Human Resources Office in advance.

Please keep in mind that FMLA intermittent leave for the birth of a child or placement of a child for adoption or foster care the leave must be concluded within 12 months of the birth or placement.

Employees may have greater rights under their collective bargaining agreement or Civil Service Regulation 2.03.

See 29CFR825.201:
An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement, unless state law allows, or the employer permits, leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period. However, see Sec. 825.701 regarding non-FMLA leave which may be available under applicable State laws.

Also see 29CFR825.203:
(b) When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

12. If an employee needs to take time off to take care for their parents, or to take care of some things legally that has to do with their parents, is that covered under FMLA?

FMLA Family Care Leave is available for an employee who needs to take time off of work to care for their parent(s). The time away from work may be counted toward their FMLA leave entitlement if the employee is eligible for FMLA and the reason for the family care leave is the serious health condition of their parent(s), as certified by a health care provider, and the employee is needed to care for their parent(s), as certified by a health care provider. However, if the employee needs to go to court to take care of legal issues for a parent it would not be covered under FMLA.

13. How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?

To determine the amount of leave used by an employee, please see the FMLA section listed below.

See 29CFR825.205:

(a) If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. For example, if an employee who normally works five days a week takes off one day, the employee would use 1/5 of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use 1/2 week of FMLA leave each week.

(b) Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

(c) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(d) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

14. Do holidays that take place during an employee's FMLA leave count toward their FMLA entitlement?

Yes, if the employee is totally off work and any of their up to 12 weeks of FMLA leave contains a holiday, the entire work week, including the holiday, would count toward their FMLA leave entitlement.

See 29CFR825.200:

(f) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for

retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement.